No. 15,789

United States Court of Appeals

For the Ninth Circuit

HELEN MAY GARDNER GLASER and GEORGE R. GARDNER,
Appellants,

vs.

FRANCES SHENK HESTER, also known as Frances Shenk Hester Gardner and WILLANE HESTER HAYNES,
Appellees.

BRIEF FOR THE APPELLANTS.

ALVIN LANDIS,
JESSE E. FLUHARTY,
LANDIS, BRODY & MARTIN,
926 J Building, Sacramento 14, California,
Attorneys for Appellants.

Subject Index

Table of Authorities Cited

Codes

No. 15,789

United States Court of Appeals

For the Ninth Circuit

HELEN MAY GARDNER GLASER and GEORGE R. GARDNER,
Appellants,

vs.

FRANCES SHENK HESTER, also known as Frances Shenk Hester Gardner and WILLANE HESTER HAYNES,
Appellees.

BRIEF FOR THE APPELLANTS.

I.

JURISDICTION.

This is an appeal from a judgment of the United States District Court for the Northern District of California, Northern Division (Cl. Tr. pp. 20-21). Notice of Appeal to this Honorable Court was timely filed (Cl. Tr. p. 21). The causes of action were for the recovery of the proceeds of a National Service Life Insurance Certificate issued on December 1, 1942, by the United States on the life of one William E. Gardner, Jr., who died on March 16, 1952. Jurisdiction is

conferred on the District Court under 38 U.S.C., Sections 445 and 817. Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291 and 38 U.S.C., Sections 445 and 817.

II.

STATEMENT OF THE FACTS.

William E. Gardner, Jr., veteran of World War II, had issued on his life a National Service Life Insurance policy in the sum of ten thousand dollars ($10,000.00). This policy was taken out on December 1, 1942. He died on March 16, 1952. The policy was in force at the time of his death and the United States does not deny liability thereon. The controversy is between claimants to the proceeds.

On September 14, 1950, the Appellants had been designated as the beneficiaries under the life insurance policy (Cl. Tr. p. 70). On April 30, 1951, the decedent purported to execute a change of beneficiary, designating the Appellees as the persons to whom the proceeds of the policy should be paid in the event of his death. Appellants attack the validity of this change in beneficiary.

Appellants' complaint is in three counts. Counts I and II of the complaint predicate the invalidity of the change of beneficiary executed by the decedent on April 30, 1951, on mental incompetency. Count III predicates invalidity on coercion and undue influence exerted upon the decedent by the Appellees (Cl. Tr.

pp. 3-10). The answer filed by the Appellees put these matters in issue (Cl. Tr. pp. 11-13). Thereafter a trial was had to a jury. Upon the close of the Appellants' case, the District Court sustained a motion for a directed verdict, directed the jury to return a verdict for the Appellees, and entered judgment for the Appellees accordingly (Cl. Tr. pp. 18-20).

III.

THE EVIDENCE.[1]

A. The Medical Evidence.[2]

Exhibit A. Report of Physical Examination, Mather Field, California, dated May 25, 1942 (Cl. Tr. p. 27).

This record discloses that William E. Gardner, Jr., joined the Armed Forces of the United States in May, 1942, and, after a physical examination, was found physically fit for military service.

---

[1]Pursuant to a request for admission filed by the Appellants, the Appellees stipulated to the genuineness of the documents enumerated in the request, reserving the right to object to the admission of these documents in evidence on the grounds of competency, materiality, and relevancy (Cl. Tr. pp. 14-17).

[2]It is conceded that the extracts quoted from the medical records are selective. It is obvious that to quote all of the medical evidence would unduly prolong this brief, but more important, since the basic question is whether there was sufficient evidence to submit the issue of mental competency to the jury, it appears necessary that the attention of this Court be called to that portion of the evidence which bears primarily upon this question. See arguments under Point II.

Exhibit B. Proceedings of Army Retiring Board in the Case of First Lieutenant William E. Gardner, Jr., held on February 2, 1945 (Cl. Tr. p. 29).

This record discloses that in December, 1942, Gardner went on a field problem at Fort Monmouth and received a head injury which resulted in his developing idiopathic epilepsy. Epileptic attacks began in December, 1942, and increased in severity and in number both overseas and while in the Eighth General Hospital. At the conclusion of the hearing, the Board found that Gardner had been incapacitated as a result of an incident of service, that the incapacity was Epilepsy, mixed type, grand mal, and petit mal, and that the incapacity was permanent. The hearing further developed that emotional or physical stress could cause the attacks to recur.

Exhibit D. Application for Hospital Treatment or Domiciliary Care, dated November 25, 1946 (Cl. Tr. p. 36).

The history attached to this application sets forth, among other things, as follows:

> "Last Saturday, [November 23, 1946], two days ago, while at home patient suddenly became very weak, and felt as though he were going to lose consciousness. This was accompanied by a severe contracting type headache. However, he did not completely lose consciousness, nor did he have any convulsions. He had no previous similar episode. He had some difficulty getting in touch with his Doctor, but after contacting him, he took more Dilantin, as was prescribed. This resulted in almost complete subsidance of the head-

ache, but the weakness persisted, and although much less, it is still somewhat present."

The physicial examination then notes that the matter should be referred to the Neurologist, that there is "possible recent cerebral organic change."

Exhibit E. Application for Hospital Treatment or Domiciliary Care, January 13, 1948 (Cl. Tr. p. 38).

The symptoms disclosed on the medical portion of this Exhibit recite "irritability, confusion, mild blackouts without falling but with occasional Sphincter incontinence."

Exhibit F. Summary Report on William E. Gardner, Jr., dated December 4, 1948 (Cl. Tr. p. 39).

The data as of April 28, 1948, recite, among other things, as follows:

"This 29-year old white male gives a history of having flicker black-outs beginning in December of 1942. . . . Early in 1944, the patient was shipped overseas to the South Pacific and after about six months he began to have about 10-12 flicker black-outs daily. With this development, the patient turned into the hospital for examination. He was subsequently returned to the States to Letterman General Hospital and subsequently to DeWitt General Hospital . . . The patient was discharged from DeWitt General Hospital on 3/19/45, with a diagnosis of grand mal and associated petit mal Epilepsy and was placed on Dilantin—gr. 4.½ daily.

"From that date to the present the patient has been maintained on that medication with fair control. However, within recent months, the pa-

tient has experienced severe financial set-backs and marital difficulties. These factors have been aggravated by increasing frequency and severity of seizures."

Exhibit G. Psychiatric Report on William E. Gardner, Jr., July 29, 1949 (Cl. Tr. p. 41).

The statement of Dr. Brownfield, Psychiatrist, states in part:

". . . In his visits, he has shown much verbal aggression, which is barely disguised, against the Creator who seems to be representative to him of all authority figures and of his father who deserted his mother when the patient was seven years old. All this hostility and a dependency upon others for reassurance and support is thinly veiled. Some paranoid trends are evident but thus far no psychotic evidence is present."

The clinical and psychological data attached to this Exhibit sets forth among other things, the following:

"Intellectually, the patient is of high average intelligence, but his productivity is severely restricted by the rigid intellectual control that he must use in dealing with his environment. His perception of reality is more determined by his inner needs than by obvious factors which results in quite idiosyncratic perceptual processes.

The patient is basically a rigid individual who has overwhelming dependency needs and hostile impulses which he cannot accept. His attempt to deal with these is primarily through the mechanisms of denial and projection. He is an immature individual who is striving constantly

to preserve his masculinity and potence by, what are essentially, reaction formations. . . .

He possesses an active fantasy life which is immature and in which projection mechanisms play a major role. In fantasy, the ideas of grandeur are frequent, and it is probable that he has difficulty distinguishing between fantasy and reality.

This patient shows much sexual maladjustment, and he cannot accept the active masculine role in a heterosexual relationship since this role is confused with aggression. Furthermore, there are strong homosexual conflicts at an unconscious level which demand the mobilization of defenses. . . .

Diagnostically, the patient presents the picture of a paranoid personality with compulsive trends. He is not presently psychotic; however, the extensive projection, the difficulty in distinguishing reality, and the nature and strength of the defense mechanisms indicate that a psychotic break is possible if additional stress from the environment is met.

This patient is basically a paranoid personality whose present picture is that of a compulsive neurotic. His defense of denial, rigid overcontrol, repression, projection, compulsion, and reaction formation are primarily directed against unacceptable hostile impulses, overwhelming dependency needs, and homosexuality."

Exhibit H. Hospital Record of Veterans Administration Hospital for period October 6, 1949, to November 8, 1949 (Cl. Tr. p. 44).

The laboratory data include the following statement:

"... The family was notified that the patient was both physically and mentally ill and that there was a possibility of an expanding type of lesion of the brain as indicated by his last EEG. Family was also notified that the patient at the present time was not considered mentally competent ...
Status on Discharge: 1. Epileptic status improved over entry.
2. Mental status, poor."

Exhibit L. Record of Veterans Administration Hospital, from October 11, 1950, to December 22, 1950 (Cl. Tr. p. 53).

This is a voluminous record of Gardner's hospitalization, treatment, and condition. The doctor's progress notes are set forth chronologically. Dates will be noted to facilitate the place in the Exhibit from which the extracts are taken. The following is from the "History" sheet.

"... The present episode which brought him to the hospital occurred on October 5, when at his mother's apartment in Sacramento he became suspicious of his mother and brother, thought they were trying to keep him from reaching the police and thought that other people he knew were tying him in with a dope racket. He attempted to contact the police by telephone from a store near his home but was not satisfied. He set out to the police station and accepted a lift from a woman who was passing in an automobile and when she attempted to stop her automobile and run away he began to fight with her and struck her several times. The police finally arrived and

took him to jail, from where he was transferred to the Sacramento County Hospital and sent to VAPA October 12, 1950."

The clinical and psychological data of October 21, 1950, sets forth as follows:

"The patient is above average in intelligence and does not show evidence of deterioration of his intellectual capacities, per se, due to brain damage. At present he feels he is under scrutiny and he is making an effort to appear normal and sensible. He is quite guarded and cautious in revealing himself. Although there is a surface appearance of normality, when he is put under emotional pressure, his control weakens and shows evidence of bizarre and unrealistic thinking of a psychotic nature."

"His brittle control may break, and he reacts in an impulsive, erratic manner, or else he may distort reality in a paranoid manner and find reasons to justify the expression of his hostilities. During these periods his behavior will be psychotic and unpredictable."

Doctor's progress notes of October 18, 1950:

"Mr. Gardner's girl friend, Mrs. Hester, was interviewed yesterday. She has been putting much pressure on the front office to have the order rescinded which prohibits her from visiting patient . . .

. . . She is some 15 years older than the patient, has a married daughter of her [own]. They have been living together for some three years now and plan to marry when divorce becomes final.

Mrs. Hester is a tall woman, about 45, somewhat thick features, masculine voice and manner. She emphasized how proud she was that she was not too feminine and disliked being catty. Wondered if patient could be benefited by truth serum or hypnotism. Stated that he had exhibited no bizarre behavior with her except that periodically he would become quite fearful of wife's agents being outside and would pull the shades down in their rooms. She believed his delusions were the result of lack of medication and ideas planted in his mind by his mother. Believes that many of his seizures are a response to psychological episodes."

Doctor's progress notes of October 23, 1950:

". . . There continues to be a good deal of conflict between his girl friend, Mrs. Hester, and his mother. He is somewhat evasive whether he intends to contest the action [for guardian]. Patient talked of wanting to marry Mrs. Hester, an older person; one who is more stable than his former wife . . . "

Doctor's progress notes of December 22, 1950:

"As expected, prognosis regarding future psychotic break is highly guarded. Enough evidence for future difficulties is present in that the relationship with Mrs. Hester is a very tenuous one, based upon highly neurotic reasons. The attitude of the patient's mother is against any successful adjustment between Mrs. Hester and the patient . . . It is noted by the patient that these seizures come and go; directly related to his emotional tension, and it is felt that these may recur as

emotional tension becomes unbearable. It was felt previous to his leaving the hospital that his relationship with Mrs. Hester was the best of a very poor circumstance and his leaving here was also the best of a very poor situation . . ."

The evaluation of December 22, 1950, included in the "Psychological Data":

"The patient was seen on two occasions. These revealed information consistent with the patient's hospital behavior and history. The ward staff has discussed this patient on several occasions and has felt that his conflicts are particularly severe and intimately tied to his present relationship with Mrs. Hester. He plans to marry this lady who is over twenty (20) years his senior. We had not been hopeful of any further assistance that the hospital can offer beyond the stabilization of medication. The patient seems unable to benefit from psychotherapeutic or occupational therapy measures which could be taken here."

B. The Evidence and Testimony With Respect to Gardner's Understanding, Motivation, and Conduct.

Exhibit O-1. Certified Copy of Death Certificate (Cl. Tr. pp. 67-68).

This document was admitted in evidence with the restriction that the word "suicide" be covered over.

Exhibit S. Judgment of Mental Illness, dated October 10, 1950 (Cl. Tr. pp. 74-77).

This document reads in pertinent part as follows:

"It is ordered, adjudged, and decreed that William E. Gardner, Jr., is a mentally ill person, and

that he be committed to a facility of the Veterans Administration or other agency of the United States, to-wit: Veterans' Hospital at Palo Alto, in accordance with the provisions of Section 1663 of the Probate Code of the State of California."

Testimony of George Robert Gardner (Cl. Tr. pp. 78-87).

It was sought to establish through this witness the relationship between Gardner and his family and conversations with Gardner concerning the insurance policy. The District Court sustained objections to this line of inquiry. Objection was sustained also to the admission in evidence of Exhibit U, a letter dated September 14, 1950, explaining why Gardner made his brother and sister the beneficiaries of the insurance policy.

Testimony of Helen Glaser (Cl. Tr. pp. 87-91).

The Court refused to permit this witness to testify concerning Gardner's love for his children and the manifestations of this affection.

Testimony of Leila G. Gardner (Cl. Tr. pp. 92-117).

Attempts to establish Gardner's affection for his children and his family as indicated in correspondence between Gardner and members of his family were denied by District Court and objections to the admission of such correspondence in evidence were sustained.

Exhibit AB is a letter dated January 5, 1948, from Gardner to his mother, expressing his love for his children and his plans for the future.

Exhibit AC is a letter of July 23, 1948, to his brother and sister of similar import.

Exhibit AD is a letter dated August 1, 1948, in which Gardner expresses a wish to succeed for the sake of his children.

Exhibit AE is a letter dated November 12, 1950, expressing his love for his mother for her interest in him.

Exhibit AF is page 2 of a letter also expressing his love for his children.

Exhibit AG is a letter dated July 20, 1951, addressed to his two sons and expressing his love for them.

Exhibit AH is a letter dated July 20, 1951, addressed to Gardner's aunt who was then taking care of his children. The letter expresses Gardner's love and affection for them.

Exhibit AI is a document dated December 3, 1949, purporting to be Gardner's Last Will and Testament. In this document Gardner attempts to devise and bequeath his estate to Appellant George R. Gardner for the benefit of his children.

Testimony of this witness concerning the conduct of Gardner under various conditions and incidents which caused violent psychotic reactions was ruled inadmissible by the District Court.

At the close of the Appellant's case, the District Court sustained Appellees' motion for a directed verdict and thereafter entered judgment for Appellees.

IV.

THE ISSUES INVOLVED.

(1) Did the District Court err in restricting Exhibit O-1 by covering over the word "suicide"?

(2) Did the District Court err in sustaining objections to the admissibility in evidence of Exhibits U, AB, AC, AD, AE, AG, AH, and AI?

(3) Did the District Court err in sustaining objections to the testimony of the witnesses George Robert Gardner, Helen Glaser, and Leila G. Gardner concerning the relationship between Gardner and his family, conduct of Gardner and his relationship with Appellees, particularly, Mrs. Hester?

(4) Did the District Court err in sustaining the motion for a directed verdict at the close of Appellants' case and entering judgment for Appellees?

V.

SUMMARY OF ARGUMENT.

1. The scope of inquiry concerning the mental competency of one seeking to dispose of property is necessarily broad and should not be unduly restricted by the District Court.

(a) Evidence relating to abnormal conduct such as "suicide" is admissible, and where a certified copy of the death certificate, completed according to statutory requirements, recites suicide as one of the causes of death, such certificate is admissible in evidence.

(b) Where evidence discloses early manifestations of irrational behavior, the period during which such behavior may be shown is necessarily extended.

(c) Letters from the person whose mental competency has been placed in issue revealing his attitudes toward the natural objects of his affections and bounty are admissible in evidence.

(d) Testimony of witnesses concerning family relationships, acts of irrational conduct, and statements of one whose mental competency is in issue are admissible in evidence.

2. The evidence admitted, together with the evidence and testimony erroneously excluded, was sufficient to require the issue of mental competency to be resolved by the jury and the District Court erred in sustaining the motion for a directed verdict at the close of the Appellants' case and in entering judgment for the Appellees.

VI.

ARGUMENT.

1. THE SCOPE OF INQUIRY CONCERNING THE MENTAL COMPETENCY OF ONE SEEKING TO DISPOSE OF PROPERTY IS NECESSARILY BROAD AND SHOULD NOT BE UNDULY RESTRICTED BY THE TRIAL COURT.

(a) **Evidence Relating to Abnormal Conduct Such as "Suicide" Is Admissible and Where a Certified Copy of the Death Certificate, Completed According to Statutory Requirements, Recites Suicide as One of the Causes of Death, Such Certificate Is Admissible in Evidence.**

The basic issue before the District Court was the mental competency of William E. Gardner, Jr., to execute the change in beneficiary on his National Service Life Insurance policy, which change designated Appellees as such beneficiaries. On September 14, 1950, he had designated the Appellants, his brother and sister, as the beneficiaries for the reason that he believed they would provide for his two minor children. On April 30, 1951, Gardner changed the beneficiary to the Appellees, one of whom, Mrs. Hester, was a woman much older than he, whom he had apparently known for a relatively short period of time, and with whom he had apparently been living and whom he subsequently married. From 1942 to the date of his death, Gardner suffered from idiopathic epilepsy. His medical history revealed steady mental retrogression from dizziness, irritability, and confusion, to delusions and fantasy, and then to intermittent mental incompetence, paranoia, schizophrenia, and psychotic manifestations.

On October 10, 1950, he was committed by the Superior Court of Sacramento County as a mentally

ill person. For a considerable period, intermittently, he received hospitalization at various Veterans Hospitals. He died on March 16, 1952.

Appellants introduced in evidence a certified copy of the death certificate (Exhibit O-1). One of the causes of death was listed as "suicide". The District Court deleted this word by causing it to be covered before the document would be admitted in evidence. This, we submit, was error.

The statutes of the State of California require, in the case of a death certificate, that there should be included a statement of antecedent causes leading to death. *Health and Safety Code,* Sections 10275, 10252. In case of suicide, the Coroner must be notified. *Health and Safety Code,* Section 10250. Section 10247 of the *Health and Safety Code,* in effect at the time,[3] states that the Coroner or other person whose duty it is to hold inquest on the body of any deceased person shall "state in his certificate the name of the disease causing death, or if from external causes (1) the means of death; and (2) whether (probably) accidental, suicidal, or homicidal."

Death certificates are official writings, *Code of Civil Procedure,* Section 1880, and are admissible in evidence upon certification, *Code of Civil Procedure,* Section 1918, subds. 5, 6. Section 1920 of the *Code of Civil Procedure* provides:

> "Entries in public or other official books or records, made in the performance of his duty by

[3]Repealed, Stats., 1957, ch. 363, sec. 1.

> a public officer of this state, or by another person in the performance of a duty specially enjoined by law, are prima facie evidence of the facts stated therein."

Suicide alone does not establish the fact of insanity but it is evidence of insanity and is relevant for consideration along with other evidence. *Ritter v. Mutual Life Ins. Co.,* 69 Fed. 505, affirmed, 169 U.S. 139, 42 L. Ed. 693. In such circumstances, the death certificate is admissible without deletion of the word "suicide." *Cropper v. Titanium Pigment Company* (CCA, 8th Cir., 1931), 47 Fed. (2d) 1038; *Guardian Life Ins. Co. v. Kissner* (CCA, 8th Cir., 1940), 111 Fed. (2d) 532; see also *Krug v. Mutual Benefit Health and Accident Ass'n.* (CCA, 8th Cir., 1941), 120 Fed. (2d) 296; and *cf Brown v. Maryland Casualty Co.* (CCA, 8th Cir., 1932), 55 Fed. (2d) 159.

In *Cropper* error was claimed in sustaining an objection to the admission in evidence of a certified copy of a death certificate which showed death resulting from sulphuric dioxide gas. Pointing to the Missouri statutes which provided that a certified copy of a death certificate "shall be prima facie evidence in all courts and places of the facts stated therein," the Court ruled that the cause of death was an issue and that it was error to exclude the death certificate.

In *Guardian Life Insurance Company,* a death certificate was admitted in evidence and it was claimed that such admission was in error. On page 534 the Court states:

> "Under the Missouri statute, a certified copy of a death certificate 'shall be prima facie evidence in all courts and places of the facts stated therein.' (citing authorities). Previous provisions of the statutes specify what the certificate of death shall contain, and plaintiff's certificate, Exhibit 5, being the death certificate referred to, indicates that it was required. In *Griffith v. Continental Casualty Co.,* supra [299 Mo. 426, 253 S.W. 1043] the certificate contained recital that, 'The cause of death was as follows: Shock and injuries (fractured skull). Jumped from window. Contributory (secondary) suicide.' The Court held that it constituted prima facie evidence of all its recitals."

It is respectfully submitted, therefore, that the District Court erred in requiring the word "suicide" to be covered prior to the admission in evidence of the Appellants' Exhibit O-1.

(b) Where Evidence Discloses Early Manifestations of Irrational Behavior, the Period During Which Such Behavior May Be Shown Is Necessarily Extended.

The District Court apparently predicated its rulings with respect to the admissibility of evidence on the theory that it was necessary for Appellants to establish Gardner's mental incompetency as of April 30, 1951. For example, the Court states (Cl. Tr. p. 82):

> "The Court. The only state of mind we might possibly be interested in, and definitely are interested in, is April 30, 1951."

Again, in the absence of the jury the following colloquy took place:

> "Mr. Fluharty. Your Honor, I wish to show by the testimony of this witness that Mrs. Hester, who at that time, of course, was not married to the decedent, called him, calling herself Mrs. Gardner and that when the decedent talked to her on the phone during the course of this telephone conversation, he went into a psychotic incident, attempted to commit suicide by slashing his wrist and butting his head against the wall, and it was necessary to call an ambulance in order to restrain him.
>
> The Court. 1949?
>
> Mr. Fluharty. Yes, your Honor, 21st of November.
>
> The Court. How does that help me decide, and the jury, decide whether or not the designation of beneficiary as of April 30, 1950 (sic), was a voluntary act?" (Cl. Tr. p. 108).

The test, however, is not whether Gardner was mentally incompetent on April 30, 1951. The true test is whether the evidence is of such a nature and of such sufficiency as would enable a jury to draw a reasonable inference of mental incompetency as of that date. An inquiry relating to mental incompetency is not limited solely to direct evidence of the mental condition as of the date of the dispositive act.

Mental infirmities vary in degree and kind. Manifestations of such infirmities are exceedingly diverse. These truisms compel the extension of the scope of inquiry before and beyond the date of the dispositive act to determine whether the degree and kind of

irrational behavior has reached a point at which the law would hold that conduct from which ordinarily certain legal consequences would flow has no legal effect or validity.

To the extent that definition may be attempted, it is said that insanity is that degree of mental unsoundness wherein the person involved does not possess the mental power to form conceptions, true or false, or understand the relation of things or persons. In *Redfield Estate* (1897), 116 Cal. 637, 48 P. 794, the Court puts it in the following words (page 652):

> ". . . It is commonly held that aside from those cases of dementia where the patient has not the mental power to form any conceptions whether true or false, of the relations of things, the true test of insanity is mental delusion; that if a person believes supposed facts which have no real existence, and against all evidence and probability conducts himself upon the assumption of their existence, he is as to that belief under a morbid delusion, and delusion in that sense is insanity . . ."

Mental incompetency is a broader term, and one who is not insane may, nevertheless, be incapable of legally disposing of his property. *Hellman v. Commercial Trust and Savings Bank* (1929), 206 Cal. 592, 275 P. 794. So, also, one suffering from an "insane delusion" is legally incapable of effectively disposing of his property where such delusion is a primary factor in motivating disposition. *Redfield Estate* (1897), 116 Cal. 637, 48 P. 794; *Scott Estate* (1900), 128 Cal. 57, 60 P. 527.

Where the evidence discloses, as it does here, manifestations of irrational behavior over a long period of time, the period during which such behavior may be shown is necessarily extended, since the persistent character thereof and its degree may best be shown by proof of its existence over a long period of time. *Baker Estate* (1917), 176 Cal. 430, 168 P. 881. In this case objections were made to evidence tending to show insanity at a period beginning over fifty (50) years before death on the ground that such evidence was too remote. The Court states (pp. 437-438):

> "The question whether evidence of this character is too remote from the time of the execution of the will is a matter resting very largely in the discretion of the trial court. No general rule can be given on the subject. Each case must depend upon its particular circumstances. Where the evidence tends to show that the insanity developed early in life, and was of a fixed and permanent character, the period during which the insanity may be shown is, of necessity, greatly extended. Its persistent character can best be shown by proof of its existence during a long period of time, and evidence thereof is properly admissible in such cases. 'There seems to be no agreed definition of the limit of time within which such prior or subsequent condition is to be considered; and in the nature of things no definition is possible.' (1 Wigmore on Evidence, sec. 233, p. 292) The following decisions support the rulings of the court below as to this evidence under the conditions of this case: *State v. Jones,* 50 N.H. 382 [9 Am. Rep. 242]; *United States v. Holmes,* 1 Cliff, 108 [Fed. Cas. No. 15,382]; *Herster v.*

Herster, 122 Pa. 239 [9 Am. St. Rep. 95, 16 Atl. 342]; *People v. Griffin,* 117 Cal. 583, 587 [59 Am. St. Rep. 216, 49 Pac. 711].) Of course, all the evidence on the subject was material only because of its bearing on the question of the sanity of the testator at the time of the execution of the will. Its weight was for the jury to determine."

(c) Letters From the Person Whose Mental Competency Has Been Placed in Issue Revealing His Attitudes Toward the Natural Objects of His Affections and Bounty Are Admissible in Evidence.

The Courts have given weight to a number of factors in reaching the conclusion that a person is insane, mentally incompetent, or suffering from an insane delusion. The unnaturalness of the effect of the document is a circumstance to be considered in connection with other evidence. 57 Am. Jur., Wills, sec. 139, p. 129. The attitude towards relatives and friends and changes in such attitudes, particularly, when such changes are groundless, are relevant factors for consideration in determining mental competency. *Martin Estate* (1915), 170 Cal. 657, 151 P. 138; *Teel Estate* (1944), 25 Cal. (2d) 520, 154 P. (2d) 384.

The correspondence between William E. Gardner, Jr., and his mother, brother and sister revealed quite clearly Gardner's love for his children and his realization that his brother and sister would provide for them. In fact, as is most evident from the letter of September 14, 1950 (Exhibit U), this was expressed by him as the very reason for designating them as the beneficiaries to the insurance policy. The children obviously were the natural objects of his bounty. This

was revealed, also, in Exhibit AI, the document which purported to be the Last Will and Testament of Gardner. Documents such as these are admissible in evidence to prove intention as well as understanding. *Littlefield v. Littlefield* (CA, 10th Cir., 1952), 194 F. (2d) 695.

Two District Court cases placed great stress on the unnaturalness of the dispositive act in reaching a conclusion of mental incompetency. In *Taylor v. United States* (1953) 113 F.Supp. 143, the issue was whether the insured was mentally competent to execute a valid change in beneficiary of a National Service Life Insurance policy. Holding that the decedent lacked the mental capacity to legally effect the change the Court states (page 148):

> "To be capable of effecting a valid change of beneficiary a person should have a clearness of mind and memory sufficient to know the nature of his property for which he is about to name a beneficiary, the nature of the act which he is about to perform, the names and identities of those who are the natural objects of his bounty; his relationship towards them, and the consequences of his act, uninfluenced by any natural delusions.
>
> . . . It seems impossible that decedent in his right mind would take away from his wife who had given her life to nursing and caring for their deformed, helpless, and mentally retarded child while he was away at sea, and to make a home for him while he was on the mainland, and give to a father who had been married seven or eight times and with whom the decedent had not been particularly close."

In *Metropolitan Life Insurance Company v. Anderson* (1951), 101 F.Supp. 808 at 811-12 the Court states:

> "Speaking more eloquently than any of the other evidence in the case is the change of beneficiary form. By executing this change of beneficiary form Anderson would take the proceeds of his insurance from his wife to whom he had been happily married, who day by day was selling brooms and mops to support herself and pay the bills incurred by his sickness and who by night—all night—sat in a chair at his side to attend his needs. This change of beneficiary would leave this devoted woman with $1.00 and give $1,999 to his mother who deserted him as a child and who remained out of his life until his last illness. This change in beneficiary form would give $5,000 to Anderson's son by a former marriage, whom he had seen on two occasions in his life. It is inconceivable that Anderson in his right mind would deny his wife his insurance, or a substantial part thereof, knowing full well of her devotion, of her bills including the anticipated cost of his own funeral and burial, and give this insurance to persons to whom he manifested no attachment whatever during his entire lifetime."

These cases establish the relevancy, competency and materiality of the excluded exhibits.

(d) Testimony of Witnesses Concerning Family Relationships, Acts of Irrational Conduct and Statements of One Whose Mental Competency Is in Issue Are Admissible in Evidence.

The District Court apparently considered the factor of the unnaturalness of the dispositive act as highly irrelevant and of no significance. Likewise, the District Court excluded testimony concerning family relationships, attitudes, and irrational acts of the decedent. During the testimony of the witness George Robert Gardner the following colloquy occurred (Cl. Tr. pp. 80-81):

> "The Court. Well, now, wait. You are talking generally. You got a witness on the stand who said—you asked him something about the veteran's family, I think is the way you worded it, and there was an objection it was irrelevant, and you made an offer of proof in regard to what this man says.
>
> Mr. Fluharty. I'll make an offer of proof as to each point. Is that all right?
>
> The Court. All right.
>
> Mr. Fluharty. The first point——
>
> The Court. You offer to prove by this witness that——
>
> Mr. Fluharty. That he has certain members of his family.
>
> The Court. It's agreed he had a mother, he had a father, he had one wife, and he had two children, and then he had no wife, then he had a wife. What else do you need? And he's got a brother and sister who are Plaintiffs.
>
> Mr. Fluharty. That's right. All right.
>
> The Court. What more can you prove?
>
> Mr. Fluharty. It was merely preliminary your Honor. I'm sorry. I don't want to take the Court's time. It's merely preliminary.

The Court. I know what you are getting at, but you may not be at it, at the point here."

Again, the testimony of the witness Leila G. Gardner concerning the effect on the decedent when he heard the name of Mrs. Hester and that such an incident caused him to go into a psychotic state and attempt suicide was similarly excluded (Cl. Tr. pp. 107-14). So, also the conversations which the witness Helen Glaser held with the decedent were not admitted (Cl. Tr. pp. 87-91).

The authorities cited under Point (c) establish that as a matter of law such testimony is relevant, material, and competent on the issue of mental competency.

---

2. THE EVIDENCE ADMITTED, TOGETHER WITH THE EVIDENCE AND TESTIMONY ERRONEOUSLY EXCLUDED, WAS SUFFICIENT TO REQUIRE THE ISSUE OF MENTAL COMPETENCY TO BE RESOLVED BY THE JURY AND THE DISTRICT COURT ERRED IN SUSTAINING THE MOTION FOR A DIRECTED VERDICT AT THE CLOSE OF THE APPELLANTS' CASE AND IN ENTERING JUDGMENT FOR THE APPELLEES.

In almost every jury trial the Trial Judge is confronted with the preliminary question as to whether there is any evidence upon which the jury can properly proceed to find a verdict for the party producing it and upon whom the burden of proof is imposed. In determining whether a case should be taken from consideration of a jury, the Court must first determine whether the evidence is all one way or so overwhelm-

ingly all one way as to leave no room for doubt. *Illinois Terminal R. Co. v. Freedman* (CA 8th Cir., 1953), 208 F. (2d) 675, 679, rehearing denied 110 F. (2d) 229. In making this determination the Court must take as true all the evidence adduced and all reasonable inferences deducible from such evidence shall be given their most liberal intendment. *Swift and Company v. Morgan and Sturdivant* (CA 5th Cir., 1954), 214 F. (2d) 115; *Burcham v. J. P. Stevens & Co.* (CA 4th Cir., 1954), 209 F. (2d) 35; *Continental Casualty Company v. Robertson* (CA 5th Cir., 1957), 245 F. (2d) 604.

In *Swift* the Court stated the rule as follows (p. 116):

> "There are several considerations which must be kept in mind on review of a case such as this: It is well settled law that cases are not to be lightly taken from the jury; that jurors are the recognized triers of fact; . . . On a motion for a directed verdict, it is the duty of the court to accept as true all of the facts which the evidence tends to prove and draw against the party making the motion all reasonable inferences most favorable to the party opposing the motion, and if the evidence is of such a character that reasonable men in an impartial exercise of their judgment may reach different conclusions, then the case should be submitted to the jury."

In *Burcham* the Court put the rule thusly (p. 37):

> "It is well settled that on a motion for a directed verdict or on a motion for judgment n.o.v. based on such motion, the evidence must be considered in the light most favorable to the party

> against whom the directed verdict or the judgment n.o.v. is asked, that any conflict in evidence must be resolved in his favor and that every conclusion or inference that can be legitimately drawn therefrom must be drawn . . .''

With these principles in mind, let us briefly review the evidence.

William E. Gardner, Jr., the decedent, was a devoted father to his two children. At the time he designated Appellants as the beneficiaries the children were about five and ten years of age, respectively. Presumably, because of Gardner's illness and marital difficulties the children were cared for and raised by his mother and the Appellants. Exhibit AE indicates they had assumed financial responsibility for the children's welfare, but the District Court curtailed inquiry concerning family relationships. The excluded evidence, however, establishes that (1) Gardner realized a responsibility for his children, and (2) that his responsibility could in part, at least, be fulfilled by leaving the insurance proceeds to the Appellants. Exhibit U eloquently points this out. In this letter, Gardner states in part:

> ''I realize that the insurance written your way would mean that you would be careful in it being spent for them. I know you would really have a thought for them in every way practical.''

It is true that the Appellants and not the children were the named beneficiaries, but this obviously was Gardner's way of protecting the children. That Ap-

pellants were quite willing to utilize the money for the benefit of the children is revealed in the pleadings wherein Appellants sought to be declared as trustees of the fund for the children's benefit.

On the other hand, what was Gardner's relationship with Mrs. Hester which would naturally make her the beneficiary as against the children? At the time she was designated the beneficiary she was not married to Gardner, although she was living with him. Gardner's hospitalization apparently required some analysis concerning his relationship with Mrs. Hester. The hospital records disclose that she was a woman fifteen or twenty years older than he, with a married daughter. Apparently she was a capable business woman and certainly not in need of his support. She was a dominant personality. The Social Data of December 22, 1950, from Exhibit L contain the following:

> "Patient and Mrs. Hester are very much alike in their disdain of people in general and authority in particular. Mrs. Hester says she never deals with the Secretary when the boss is around. Indirectly, her anger and hostility towards the doctors was shown by referring to them as 'not being dry behind the ears.' She 'used' social worker before the latter was aware of it by coming into me in the morning and in this way visiting patient also prior to visiting hours which enforced for everyone else as 1:00 o'clock. She spoke contemptuously of the other women employees of the Doud Realty Company whose conversation about the clothes and other triviata didn't interest her."

The relationship between them was neurotic and tenuous. On December 22, 1950, the doctor sets forth in his notes that:

> "It was felt previous to his leaving the hospital that his relationship with Mrs. Hester was the best of a poor circumstance and his leaving was also the best of a very poor situation . . ." (Exhibit L.)

In the Social Data of December 7, 1950, the note was made that Mrs. Hester was a mother substitute. Again, in the Summary of November 23, 1950, it was noted that Gardner "can relate to nurturent mother figures as long as the roles are unconscious."

The records reveal other instances in which Gardner's attitudes towards Mrs. Hester was predicated on his unconscious evaluation of her as a mother.

The records of his hospitalization and treatment conclusively establish that Gardner was a mental case and that his sanity was steadily leaving him. His resentment against his mother is based upon a delusion. The history of Exhibit L recites that on October 5, 1950, "he became suspicious of his mother and brother, thought they were trying to keep him from reaching the police and that other people that he knew were tying him in with a dope racket." It is noteworthy that this incident occurred after he had designated his brother and sister as beneficiaries to the proceeds of the policy. The medical records further disclose that when Gardner was under emotional strain, he showed evidence of bizarre and unrealistic thinking of a psychotic nature, that he would distort

reality in a paranoid manner, and during such periods his behavior would be psychotic and unpredictable. Gardner left the hospital about December 22, 1950, and apparently stayed with Mrs. Hester. On April 30, 1951, four months later, he changed the designation of beneficiary. At the time he left the hospital, however, the doctors carefully stated that the "expected prognosis regarding future psychotic break is highly guarded."

In *Cardwell v. United States* (CA 5th Cir., 1951), 186 F. (2d) 382, wherein the Court had before it the propriety of a directed verdict, the Court states (pages 384-5):

> "In order to justify a directed verdict the evidence must be such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict . . ."

Under proper instruction from the District Court and in the light of the evidence adduced upon the trial and the evidence which was improperly excluded, giving such evidence its due weight and drawing therefrom every reasonable inference, the jury could properly have found that Gardner was mentally incompetent to execute the change of beneficiary on April 30, 1951. It follows, therefore, that the District Court erred in sustaining a motion for a directed verdict at the close of Appellants' case and in entering judgment for the Appellees.

VII.

CONCLUSION.

Appellants respectfully contend that the judgment should be reversed and remanded to the District Court with directions to grant Appellants a new trial.

Dated, Sacramento, California,
March 12, 1958.

Respectfully submitted,
ALVIN LANDIS,
JESSE E. FLUHARTY,
LANDIS, BRODY & MARTIN,
Attorneys for Appellants.

(Appendix Follows.)

Appendix.

Appendix

Appellants' Exhibits	Page References to the Record			
	Identified	Offered	Received	Rejected
A	25	25	27	
B	28	28	29	
D	36	36	36	
E	37	37	38	
F	39	39	39	
G	41	41	41	
H	44	44	44	
L	53	53	53	
O-1	67	67	68	
S	74	74	74	
U	86	86		86
AB	97	97		98
AC	98	99		99
AD	99	99		99
AE	99	99		99
AF	99	99		99
AG	99	100		100
AH	100	101		101
AI	101	102		102